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Supreme Court, U.S.
FILED
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No. 99-1241

IN THE

Supreme Court of the United States

THE CHILDREN'S HOSPITAL OF PHILADELPHIA, NAZARETH HOSPITAL and NORBERT FROESE, M.D.,
Petitioners,

v.

MICHAEL CUNNINGHAM, a minor, and MATTHEW CUNNINGHAM, a minor, by and through their parents, JAMES and MARY ANN CUNNINGHAM, and JAMES CUNNINGHAM and MARY ANN CUNNINGHAM, individually; STEPHEN P. and KAREN M. GAULT, as parents and natural guardians of STEPHEN R. GAULT, and STEPHEN P. GAULT and KAREN M. GAULT, individually; BRIAN PECK, a minor, by and through his parents and natural guardians, MARY and KEVIN PECK and MARY PECK and KEVIN PECK individually,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF COMMON PLEAS OF THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

MEMORANDUM FOR RESPONDENT SUSAN C. NICOLSON, M.D.

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LIST OF PARTIES

Petitioners in this Court are the Children's Hospital of Philadelphia, Nazareth Hospital, and Norbert Froese, M.D., Defendants in the underlying medical malpractice actions.

Respondents are Michael Cunningham, Matthew Cunningham, James Cunningham, Mary Ann Cunningham, Stephen P. Gault, Karen M. Gault, Stephen R. Gault, Brian Peck, Mary Peck and Kevin Peck, Plaintiffs in the underlying actions.

Respondents not joined in the Petition, but who are defendants in the underlying actions, are KRN Associates, Arnold S. Kessler, M.D., David Binder, M.D., S. Bruce Rubin, M.D., Hooshang Nikoo, M.D., Stephen L. Kessler, M.D., William I. Norwood, M.D., Children's Surgical Associates, Ltd., David R. Jobes, M.D., Marshall L. Jacobs, M.D., John D. Murphy, M.D., and Susan C. Nicolson, M.D.

Respondent Susan C. Nicolson, M.D. (Dr. Nicolson) supports the position of Petitioners and submits this Memorandum pursuant to Rule 12.6. For purposes of this Memorandum Dr. Nicolson adopts, without addition, the material in the Petition for A Writ of Certiorari ("Petition") under the headings "Question Presented," "Statement of Jurisdiction," and "Constitutional Provision Involved."

OPINIONS BELOW

Dr. Nicolson adopts the material in the Petition for A Writ of Certiorari under the heading "Opinions Below." In addition to the orders and opinions referenced in the Petition and attached thereto as Appendix B, the Court of Common Pleas separately denied Dr. Nicolson's motion for reconsideration on September 18, 1998 for the same reasons it denied Petitioners' motion for reconsideration. The September 18, 1998 order relating to Dr. Nicolson is unreported and reproduced at 1a.

STATEMENT OF THE CASE

Dr. Nicolson adopts the material in the Petition under the heading "Statement of The Case."

Dr. Nicolson is a defendant in the underlying case *Peck v. The Children's Hospital of Philadelphia,* No. 821, July Term 1994 filed in the Court of Common Pleas of Philadelphia County, Pennsylvania. The Trial Court granted summary judgment in favor of Dr. Nicolson as it had to the Petitioners. *See* Petition at 11a. Plaintiffs did not appeal.

In response to Plaintiffs' Petition to Open, Dr. Nicolson raised the same issues as did the Defendants who have filed the Petition For A Writ of Certiorari. Dr. Nicolson answered Plaintiffs' Petition To Open, denying plaintiffs' allegations, and joined in the Petition For A Scheduling Order, requesting discovery and an evidentiary hearing. After the Trial Court summarily granted Plaintiffs' Petition to Open and denied the Petition For A Scheduling Order, Dr. Nicolson sought reconsideration which the Trial Court denied. As did the Petitioners, Dr. Nicolson sought appellate review in the Superior

Court of Pennsylvania and the Supreme Court of Pennsylvania, both of which denied review. *See* Petition at 104a, 107a, 111a, 115a.

REASONS FOR GRANTING THE WRIT

Dr. Nicolson adopts the material in the Petition under the heading "Reasons For Granting the Writ." Pursuant to Rule 12.6, Dr. Nicolson supports the Petition inasmuch as she raised the same issues below. *O'Bannon v. Town Court Nursing Center,* 447 U.S. 773, 783 n. 14 (1980); *Director, Office of Workers' Compensation Programs, U.S. Dept. Of Labor v. Perini North River Associates,* 459 U.S. 297, 300-305 (1983); *Mullins Coal Co. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor,* 484 U.S. 135, 140 n. 8 (1987).

CONCLUSION

For these reasons, certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE COURT OF COMMON PLEAS OF THE
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

In re Thomas Smith, Esquire	:	February Term, 1998 No. 1164
Re:		
Peck	:	July Term 1994 No. 821
v.	:	
Childrens' Hospital of Phila. et al.	:	**Docketed Civil Administration Sep 18 1998 C. KELLY Copies Mailed on 9/21/98**

ORDER

AND NOW, this 18th day of September, 1998, upon consideration of the Motion for Reconsideration of Defendant Susan C. Nicolson, M.D., it is ordered that this motion is DENIED for the reasons set forth in the Memorandum Opinions dated August 20, 1998 and September 18, 1998.

BY THE COURT:

/s/
JOHN W. HERRON